AFR.

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.209 of 2002

Yugal Kishor and others

- Versus -

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge
14-9-2007

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

I agree

Sd/-
Sunil Kumar Sinha
Judge

POST FOR JUDGMENT ON 17TH SEPTEMBER, 2007

Sd/-
L.C.BHADOO
Judge

(73)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.209 of 2002

APPELLANTS/: (Accused)	1.	Yugal Kishor, son of Ravishankar Devangan, aged about 21 years, resident of Village Changorabhatha, Police Station Purani Basti, Distt. Raipur, C.G.
	2.	Umesh, son of Kailash Yadav, aged about 19 years.
	3.	Laxmichand, son of Bhagela Ram Yadav, aged about 23 years.
	4.	Shankar Lal, son of Bhoj Ram Yadav, aged about 23 years.
		Above three are residents of Village Near Changorabhatha, Police Station Purani Basti, Distt. Raipur, C.G.

- Versus -

RESPONDENT/: (Prosecution)	State of Chhattisgarh, Through Police Station Incharge Purani Basti, Distt. Raipur, C.G.

{Criminal appeal under Section 374 (2) of the Code of Criminal Procedure}

Present: -

Mrs. Savita Tiwari, Advocate: For appellants No.1 & 2.

Mr. Janak Ram Verma, Advocate: For appellants No.3 & 4.

Mr. Ashish Shukla, Addl. Public Prosecutor with Mr. Akhil Mishra, Panel Lawyer: For the State/respondent.

Coram: - Hon'ble Mr. L.C. Bhadoo and Hon'ble Mr. Sunil Kumar Sinha, JJ.

JUDGMENT

(Delivered on 17th September, 2007)

The following judgment of the Court was delivered by ***L.C. Bhadoo, J.*** -

1. The appellants have preferred this appeal against the judgment of conviction and order of sentence dated 20th December, 2001 passed by the 7th Additional Sessions Judge, Raipur in Sessions Trial No.71/2001, whereby learned Additional Sessions Judge after holding the accused/ appellants guilty for commission of offence under Sections 148, 302 read

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with Section 149 & 323 read with Section 149 of the I.P.C., sentenced each of the accused/appellants to undergo R.I. for two years, imprisonment for life and pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for six months and R.I. for one year, respectively.

2. Case of the prosecution, in brief, is that on 25th October, 2000 some altercation took place between Ashish Dubey (since deceased) and accused Yugal. Ashish Dubey called accused Yugal as Bhootnath, therefore, Yugal abused Ashish Dubey whereupon, Ashish Dubey gave beating to Yugal on which Yugal threatened Ashish that he will see him. On the fateful day i.e. 27-10-2000 Ashish Dubey & Bharat (eyewitness) were standing at Changorabhatha in the field of boys' hostel. Accused Yugal, Laxmi, Umesh, Shankar, 20 other named accused persons and one juvenile offender Neelu @ Tulsiram came there abusing and carrying Lathi, Danda, rod & Farsi in their hands. They were talking to attack Ashish Dubey, therefore, Ashish Dubey ran towards the house of Sarpanch. The accused persons chased him, after encircling him started abusing and saying that he had beaten Yugal, therefore, they will not leave him. All the accused persons started attacking Ashish Dubey with Lathi, club, Gupti, rod & sword. When Bharat ran towards Ashish Dubey to intervene, they attacked Bharat also. Ashish Dubey became unconscious and fell down. He sustained multiple injuries and died instantaneously. Bharat also sustained simple injuries on head & hand. Manish Thakur & Parmanand were also present there, they witnessed the incident.

3. The Police were informed and receiving the information, they took Ashish Dubey & Bharat to Medical College Hospital, Raipur where the doctor declared Ashish Dubey brought dead. Bharat was got medically examined. On the information given by Bharat, Dehati Nalishi Ex.P-3 was registered. Based on the Dehati Nalishi, first information report Ex.P-4 was registered. The Investigating Officer after giving notice Ex.P-1, prepared inquest Ex.P-2 on the body of Ashish. Body of Ashish Dubey was sent for post-mortem examination to Forensic Medicine Department, Mekahara Hospital, Raipur, where Dr. Sanjay Kumar Dadu (PW-9) conducted post-mortem on the body of Ashish Dubey. The doctor noticed 26 injuries on his body and opined that cause of death was shock &

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haemorrhage as a result of stab injury to abdomen, injury caused by hard, sharp & penetrating object. He opined that the death was homicidal in nature. Injuries No.1 to 24 were caused by hard & blunt object. Based on the memorandum of accused persons various weapons of offence were seized. Bharat was examined by Dr. S. Bist who prepared injury report Ex.P-49 and noticed two lacerated wounds on scalp & forehead.

4. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Raipur, against 30 accused persons including the four appellants, who in turn committed the case to the Sessions Judge, Raipur, from where learned 7th Additional Sessions Judge, Raipur received the case on transfer for trial.

5. In order to establish charges against the accused persons, the prosecution examined 16 witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the material appearing against them in the prosecution evidence and stated that they have been implicated in a false case. Learned Additional Sessions Judge after hearing counsel for respective parties, convicted and sentenced the four accused/appellants as aforementioned, whereas acquitted other 26 accused persons of all the charges.

6. We have heard Mrs. Savita Tiwari, learned counsel for appellants No.1 & 2, Mr. Janak Ram Verma, learned counsel for appellants No.3 & 4 and Mr. Ashish Shukla, learned Additional Public Prosecutor with Mr. Akhil Mishra, learned Panel Lawyer for the State.

7. Learned counsel for the appellants have not disputed the homicidal death of Ashish Dubey. Moreover, Bharat (PW-3), injured eyewitness, has stated in his evidence that the accused/appellants along with other accused persons attacked the deceased with Lathi, club, rod, sword & knife, therefore, the deceased sustained injuries and died instantaneously. Above ocular evidence is corroborated by the medical evidence of Dr. Sanjay Kumar Dadu (PW-9) who has stated that on 27-10-2000 he was working as Assistant Professor, Forensic Medicine Department, Medical College Hospital, Raipur, on that day, the body of Ashish Dubey was brought for post-mortem examination. He conducted post-mortem and has stated that he noticed as many as 26 injuries out of which 8 were lacerated wounds on head & parietal region, at 14 places there were abrasions and two stab wounds on stomach. Clotted blood was found

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beneath muscles & veins of neck, there were multiple fractures of thyroid cartilage, 6th & 8th ribs were fractured, lot of blood was present behind the peritoneum and blood vessels of vigentric membrane was ruptured. Cause of death was excessive bleeding and shock as a result of stab wound. The death was homicidal in nature. Post-mortem report is Ex.P-50. Therefore, in view of the above ocular and medical evidence, it is established that the death of Ashish was homicidal in nature.

8. As far as involvement of the accused/appellants in the commission of crime is concerned, learned Additional Sessions Judge has acquitted 26 accused persons on the ground that Bharat (PW-3) has not identified those 26 accused persons. Learned Additional Sessions Judge further held that since names of four accused persons have been mentioned in Dehati Nalishi Ex.P-3 and in the Court evidence also Bharat (PW-3) has stated about the four accused persons, Yuvraj was acquitted giving him benefit of doubt and further held that identification of accused Hemlal & other accused persons was not conducted.

9. The prosecution examined three witnesses as eyewitness namely, Bharat (PW-3), Manish (PW-10) & Parmanand Sahu (PW-11). Presence of all the three witnesses on the spot is established because, PW-3 is injured witness who had lodged Dehati Nalishi Ex.P-3. Bharat has stated in his evidence that Manish & Parmanand Sahu were also present on the spot, but they have turned hostile and they have not supported the prosecution case. Manish (PW-10), however, has stated in his evidence that when he was standing in the ground, about 50-60 persons came carrying bamboo stick in their hands saying/crying 'Maaro Maaro', thereafter, he left for his residence. In cross-examination, he has stated that Bharat was present there.

10. Bharat (PW-3) has stated in his evidence that out of 30 accused persons he can identify accused Laxmi, Shankar, Umesh, Yugal & Yuvraj, after indicating towards accused Hemlal, he said that he can recognize him by face. He cannot recognize remaining 24 accused persons. He has further stated that Yuvraj informed him that people are playing cards in the field, therefore, he along with Yuvraj, Manish & Parmanand came in the field for playing cards. After some time, Ashish Dubey also came there. Manish & Parmanand were playing cards. They were watching them. At that time, about 30-40 persons of old Changorabhatha came there. Accused Laxmi

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caught the collar of Ashish and started abusing him. He can recognize only four persons out of the persons who attacked Ashish and they were Yugal, Umesh, Shankar & Laxmi. Number of persons were attacking Ashish, he is unable to recognize them except these four persons. He did not see accused Yuvraj attacking Ashish. Accused Hemlal attacked him that is why he can recognize him. Number of persons attacked him also. Accused Laxmi was carrying Danda, accused Yuvraj was carrying Patia and accused Umesh was carrying iron instrument. He sustained injuries on head at 2-3 places and on hands & forehead, blood started oozing out of the injuries, he was not able to see the injuries of Ashish. Police took Ashish in a vehicle, he was also taken to the hospital and admitted. Ashish died. He lodged report Ex.P-3, and based on that, F.I.R. Ex.P-4 was registered. In cross-examination para 20, he has again stated that he saw accused Laxmi, Shankar, Yugal & Umesh attacking the deceased. In cross-examination of this witness defence has not been able to bring on record any circumstance which discredits the evidence of this witness regarding involvement of four named accused/ appellants in the crime in question.

11. Mr. Janak Ram Verma, learned counsel for appellants Laxmichand & Shankarlal, argued that as per the evidence of Dr. Sanjay Kumar Dadu (PW-9), Ashish Dubey died on account of stab wound on stomach, whereas there is no evidence that these accused persons had attacked with any sharp & pointed weapon on the stomach of Ashish, some other persons had inflicted those injuries and all other accused persons have been acquitted. Only four accused persons have been convicted. Therefore, Section 149 of the I.P.C. is not applicable. Those fatal injuries which were responsible for causing the death of Ashish Dubey are not attributed to these accused persons, therefore, they are also entitled for acquittal. Learned counsel placed reliance on the decision of the Apex Court in the matter of **Sukhbir Singh v. State of Haryana**[1].

12. Mrs. Savita Tiwari, learned counsel for appellants Yugal Kishor & Umesh, by placing reliance on the judgment of the Apex Court in the matter of **Atmaram Zingaraji v. State of Maharashtra**[2] argued that as other 26 persons have been acquitted and only four accused persons have been convicted, therefore, the accused/appellants can be convicted for their

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[1] AIR 2002 SC 1168
[2] 1997 (7) Supreme 363

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individual action and they cannot be convicted with the aid of Section 149 of the I.P.C.

13. On the other hand, Mr. Ashish Shukla, learned Additional Public Prosecutor supported the judgment of the trial Court. Placing reliance on the judgment of the Apex Court in the matter of **Kallu alias Masih & others v. The State of Madhya Pradesh**[3] argued that from evidence and record it is established that more than five persons attacked the deceased, these appellants were members of that unlawful assembly, therefore, they have been rightly convicted with the aid of Section 149 of the I.P.C.

14. Having heard learned counsel for the parties, we have considered the rival contentions made by counsel for respective parties.

15. As per the provisions of Section 149 of the I.P.C. it is necessary that an assembly of 5 or more persons having a common object i.e. one of those named in Section 141 of the Penal Code and then doing of the act by the members of it in prosecution of that object. Therefore, foundation of constructive liability under Section 149 is only membership of an unlawful assembly. As per the provisions of Section 149, if a person is member of an unlawful assembly, the common object of which is to commit a certain crime, and such a crime is committed by one or more of the members of that assembly in furtherance of the common object, then every person who happens to be a member of that assembly would be liable for the commission of the crime being a member of that assembly irrespective of the fact whether he has actually committed the criminal act or not. The common object need not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the assembly has gathered before the commission of the crime at the spot itself. Prior meeting of the mind of the members of the assembly is not necessary. The only requirement is that the members of the assembly which constitutes five or more persons, have common object and that they acted as an assembly to achieve that object. Therefore, in order to constitute offence under Section 149 of the I.P.C. *sine qua non* is that there must be assembly of five or more persons with a common object and if some body acts in furtherance of the common object then every member of the unlawful assembly is responsible as a member for the act of each and all merely because he is a member of the unlawful assembly with

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[3] AIR 2006 SC 831

common object to be achieved by such an unlawful assembly. Mere presence in the unlawful assembly cannot render a person liable unless there was a common object and that is shared by that person. The common object has to be found and can be gathered from the facts and circumstances of each case.

16. The Apex Court in the matter of **Bikau Pandey and others v. State of Bihar**[4] held that

> "In order to attract the provisions of Section 149 IPC and fastening constructive liability on the members of the assembly, it is to be seen whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. The only requirement is that member should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur with it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object." It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved,

[4] (2003) 12 SCC 616

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the accused persons cannot be convicted with the help of Section 149."

17. In the light of the above principle, if we scrutinize the evidence, Bharat (PW-3) has categorically stated in his evidence that about 30-40 persons of Village: Old Changorabhatha came on the spot, accused Laxmi caught Ashish of collar and abused him, thereafter all the persons started attacking, but he could identify only four persons, remaining persons were not identified by him. Even though, Manish (PW-10) has been declared hostile as he has not supported the prosecution case in relation to the attack made by the accused/appellants and other persons, but he has in a definite voice stated that when he was standing in the field about 50-60 persons came carrying Lathis in their hands crying/saying 'Maaro Maaro'. Bharat (PW-3) immediately lodged Dehati Nalishi Ex.P-3, in that Dehati Nalishi also he has mentioned that accused Yugal, Laxmi, Umesh & Shankar came on the scene of occurrence **along with other persons** carrying Lathi, club, rod, Gupti & Farsi in their hands. Apart from that, Dr. Sanjay Kumar Dadu (PW-9), who conducted post-mortem on the body of Ashish Dubey, has stated in his evidence that there were 26 injuries on almost all the parts of the body, right side 6th & 8th ribs were fractured and there were multiple fractures in the trachea bone. The number of injuries also establishes the fact that Ashish Dubey was attacked by large number of persons and the number of those persons was definitely more than five.

18. Therefore, from the above scrutiny of evidence and material available on record, we are of the considered opinion that the prosecution has been able to establish beyond reasonable doubt that Ashish Dubey was attacked by the members of an unlawful assembly who were more than five in number. Accused/appellants Yugal, Laxmi, Umesh & Shankar were members of that assembly who attacked deceased Ashish Dubey. The common object of that assembly is also established that all these persons came carrying Lathi & other weapons, in the first instance, accused Laxmi caught Ashish of his collar and abused him, thereafter, all of them attacked him. Motive behind the attack was that on 25-10-2000 some altercation took place between deceased Ashish Dubey and accused/appellant Yugal in which Ashish Dubey said Yugal as Bhootnath, therefore, accused Yugal abused Ashish on which Ashish attacked Yugal and Yugal threatened Ashish with dire consequences. Therefore, on 27-

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10-2000 Yugal came along with large number of persons and the objective of that assembly was to attack Ashish Dubey with deadly weapons to cause his death in order to teach him a lesson for his act of misbehaviour and beating accused/appellant Yugal on 25-10-2000.

19. Now, coming to the question raised by learned counsel for the appellants that except the four appellants all other accused persons have been acquitted, therefore, the appellants can be held responsible for their individual act as number of accused persons reduced to four, as such, the act of unlawful assembly goes away. Section 149 of the I.P.C. provides that

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

20. In this connection, the judgment of the Apex Court in the matter of **Kallu** (supra) cited by learned Additional Public Prosecutor is relevant in which the above question has been specifically considered by the Apex Court and the Apex Court referred to the principle as stated in the matter of **Dharam Pal and others v. The State of U.P.**[5] (para 10)

> "It is true that the acquittal of an accused person does raise, in the eye of law, a presumption that he is innocent even if he was actually guilty. But, it is only the acquitted accused person and not the convicted accused persons who can, as a rule, get the benefit of such a presumption. The effect of findings on questions of fact depends upon the nature of those findings. If, for example, only five known persons are alleged to have participated in an attack but the courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number. Such a case is one of doubt only as to identity of some participants and not as to the total number of participants. It may be that a definite conclusion that the number of

[5] AIR 1975 SC 1917

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> participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is doubt about the identity of even one. But, where a large number of known persons (such as eighteen, as is the case before us), are alleged to have participated and the Court acts on the principle that it is better to err on the side of safety, so that no injustice is done to a possibly wrongly implicated accused, and benefit of doubt is reaped by a large number, with the result that their acquittal, out of abundant caution, reduces the number of those about whose participation there can be no doubt to less than five, it may not be really difficult at all, as it is not in the case before us, to reach the conclusion that, having regard to undeniable facts, the number of participants could not possibly be less than five."
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> (Emphasis supplied)

21. Applying the above principle, if we examine the evidence which has been discussed above, as per Dehati Nalishi Ex.P-3 and the evidence of Bharat (PW-3) & Manish (PW-10), the attack was made by 30-40 persons, they came carrying Lathi, club, rod, sword & Gupti which finds corroboration from the post-mortem report of Ashish Dubey in which injury Nos.25 & 26 are stab wounds on stomach which establish that the injuries were inflicted by sharp & pointed weapon. Other multiple injuries were inflicted on the body of Ashish Dubey, there were multiple fractures of trachea bone and right side 6th & 8th ribs were fractured which establish that the injuries were inflicted by more than five persons. Therefore, there were more than five named and unnamed accused persons who were members of the assembly. Acquittal of 26 accused persons leaving behind the four accused/appellants, looking to the above facts and circumstances of the case, is of no help to the appellants for the reason that these 26 persons have been acquitted on the ground that they were not identified by Bharat (PW-3) and other eyewitness and there is no finding that these 26 persons were falsely implicated, therefore, mere acquittal of these persons has not reduced the number of assailants to less than five.

22. In the circumstances, it is established that number of assailants were more than five and the appellants were members of that assembly. Hence, the appellants are responsible for each of the injuries inflicted by the members of the unlawful assembly on the body of Ashish Dubey mainly fatal injury Nos.25 & 26 (stab wounds on stomach) which were the cause of death of Ashish as per the evidence of Dr. Sanjay Kumar Dadu (PW-9).

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Therefore, we are of the considered opinion that the accused/appellants have been rightly convicted with the aid of Section 149 of the I.P.C. and we do not find any illegality or infirmity in the judgment of the trial Court.

23. As far as the judgment cited by learned counsel for the appellants i.e. **Sukhbir Singh** (supra) is concerned, the above case is distinguishable on facts because in that case it was established that only the appellant attacked the deceased, main fatal blow was caused by the main accused. Merely because the other accused persons were accompanying him when the fatal blows were caused by main accused to the deceased cannot prove the existence of the common object specifically in the absence of any evidence of the prosecution in that behalf. In that case it was held that under Section 149 of the I.P.C. if it is shown that they knew before hand that the offence actually committed was likely to be committed in prosecution of the common object only then the main accused can be convicted with the aid of Section 149 of the I.P.C. In that case, the High Court reached to the conclusion that common object of the accused persons, if any, was not to cause the death of the deceased and such an intention could be attributed only to the main accused. It was further held that the prosecution evidence probabilised the version of the accused that the occurrence was sudden and unanticipated. Therefore, on the facts and circumstances of the case the Apex Court held that there was no common object of the assembly to cause death, whereas in the present case, as has been discussed above in the earlier part of the judgment, it is established that all the 30-40 persons came carrying Lathi, rod etc., the object of which was to cause the death of Ashish Dubey. They came with main accused Yugal who threatened the deceased two days prior to the incident that he will see him.

24. Similarly, on the above facts of the present case and principle of law enunciated by the Apex Court in **Dharam Pal**'s case (supra), the judgment of the Apex Court in the matter of **Atmaram** (supra) is also distinguishable on facts.

25. In the result, the appeal being devoid of merit, is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

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